

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TONY HILL,

Plaintiff,

v.

TAMMY CAMPBELL, et al.,

Defendants.

Case No. 1:23-cv-01103-JLT-EPG

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF BE
REQUIRED TO PAY THE \$402.00 FILING
FEE IN FULL IF HE WANTS TO PROCEED
WITH THIS ACTION

(ECF No. 1)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS

Plaintiff Tony Hill is a state prisoner proceeding *pro se* in this civil rights action filed under 42 U.S.C. § 1983. (ECF No. 1). Plaintiff has not paid the \$402 filing fee nor filed an application to proceed *in forma pauperis* in this action.¹

Because the Court concludes that Plaintiff had at least three “strikes” prior to filing the action and that Plaintiff was not in imminent danger of serious physical injury at the time he filed the action, the Court will recommend that Plaintiff be required to pay the \$402 filing fee in full if he wants to proceed with the action.

I. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)

Pertinent here is the so called “three strikes provision” of 28 U.S.C. § 1915.

¹ Plaintiff also has a pending motion for preliminary injunctive relief and a motion to appoint counsel. (ECF Nos. 2, 4). The Court will not address these motions until after the filing fee issue is decided.

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). In determining whether a dismissal counts as a “strike” under § 1915(g), “the reviewing court looks to the dismissing court’s action and the reasons underlying it. . . . This means that the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive.” *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (internal citation omitted). The Ninth Circuit has “interpreted the final form of dismissal under the statute, ‘fail[ure] to state a claim upon which relief may be granted,’ to be essentially synonymous with a Federal Rule of Civil Procedure 12(b)(6) dismissal.” *Id.* (alteration in original).

II. ANALYSIS

A. Strikes

Plaintiff filed this action on July 24, 2023. (ECF No. 1). The Court takes judicial notice of the following five cases, each of which counts as a “strike”: (1) *Hill v. Williams, et al.*, 2:98-cv-07173-LGB-CT (C.D. Cal.) (dismissed September 15, 1998, for failure to state a claim); (2) *Hill v. Wallace, et al.*, 2:99-cv-06406-ABC-CT (C.D. Cal.) (dismissed July 7, 1999, for failure to state a claim); (3) *Hill v. Horton, et al.*, 2:13-cv-00805-UA-CW (C.D. Cal.) (dismissed February 28, 2013, for failure to state a claim); (4) *Hill v. The Seven Eleven Corporation, et al.*, 2:13-cv-01239-UA-CW (C.D. Cal.) (dismissed March 18, 2013, for failure to state a claim); and (5) *Hill v. Michele A. Douglas, et al.*, 2:13-cv-09528-UA-CW (C.D. Cal.) (dismissed January 17, 2014, for failure to state a claim).

Additionally, the Court notes that Plaintiff has been found by other courts to have incurred at least three “strikes”: (1) *Hill v. Tehachapi State Prison*, 1:16-cv-01085-LJO-EPG (E.D. Cal.) (ECF No. 3) (concluding that Plaintiff had at least three “strikes”); (2) *Hill v. CDCR, et al.*, 1:14-cv-00002-LJO-GSA (E.D. Cal.) (ECF No. 26) (same); and (3) *Hill v. White, et al.*, 1:13-cv-1275-AWI-DLB (E.D. Cal.) (ECF No. 15) (same).

\\

\\

1 **B. Imminent Danger**

2 Because Plaintiff had at least three “strikes” prior to filing this action, Plaintiff is
 3 precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time the complaint was
 4 filed, in imminent danger of serious physical injury. The availability of the imminent danger
 5 exception “turns on the conditions a prisoner faced at the time the complaint was filed, not at
 6 some earlier or later time.” *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007).
 7 “Imminent danger of serious physical injury must be a real, present threat, not merely speculative
 8 or hypothetical.” *Blackman v. Mjening*, No. 1:16-CV-01421-LJO-GSA (PC), 2016 WL 5815905,
 9 at *1 (E.D. Cal. Oct. 4, 2016). To meet his burden under § 1915(g), Plaintiff must provide
 10 “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct
 11 evidencing the likelihood of imminent serious physical injury.” *Martin v. Shelton*, 319 F.3d 1048,
 12 1050 (8th Cir. 2003). “[V]ague and utterly conclusory assertions” of imminent danger are
 13 insufficient. *White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998). The “imminent danger”
 14 exception is available “for genuine emergencies,” where “time is pressing” and “a threat . . . is
 15 real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

16 Additionally, there is a nexus requirement between the danger alleged and the claims
 17 asserted: “Thus, in order to qualify for the § 1915(g) imminent danger exception, a three-strikes
 18 prisoner must allege imminent danger of serious physical injury that is both fairly traceable to
 19 unlawful conduct alleged in his complaint and redressable by the court.” *Ray v. Lara*, 31 F.4th
 20 692, 701 (9th Cir. 2022). Because Plaintiff is *pro se*, in making the imminent danger
 21 determination, the Court must liberally construe Plaintiff’s allegations. *Andrews*, 493 F.3d at
 22 1055.

23 Plaintiff’s complaint sues five prison officials and brings a single cause of action. (ECF
 24 No. 1). The complaint is difficult to follow; however, Plaintiff generally alleges that prison
 25 officials are cooperating with Plaintiff’s cellmates to provoke him to act violently towards prison
 26 officers and inmates. And a prison official wrote a false disciplinary report against him. He also
 27 alleges that prison officials had Plaintiff’s bunkmate put his hands, with feces on them, under
 28 Plaintiff’s nose as he slept. Lastly, Plaintiff appears to ask for a transfer and claims to be falsely
 imprisoned.

Such allegations are insufficient to show that there is a real and imminent threat to Plaintiff's personal safety under the standards described above. As noted, under the nexus requirement, Plaintiff must allege an "imminent danger fairly traceable" to Defendants' conduct. *Ray*, 31 F.4th at 701. While Plaintiff summarily alleges that prison officials are working with cellmates to provoke a violent reaction, he provides no facts to support this allegation. Moreover, some of his allegations, such as his bunkmate putting his feces covered hands under Plaintiff's nose as he slept, while troubling, do not show an imminent danger of serious physical injury.

Accordingly, because Plaintiff is a "three-striker" and does not appear to have been in imminent danger when he filed this action, the Court will recommend that Plaintiff be required to pay the \$402 filing fee in full if he wants to proceed with the action.

Lastly, the Court notes that Plaintiff's complaint states that his facts are related to another case, *Hill v. Katavich, et al.*, 1:15-cv-631-LJO-JLT. (ECF No. 1, p. 1). Notably, this was another case in which Plaintiff was found to be a "three-striker" and was dismissed after Plaintiff failed to pay the filing fee. (ECF Nos. 3, 18). Despite the case being dismissed in 2015, and Plaintiff's appeal being dismissed in 2016, Plaintiff continued to submit filings until 2021 that were repeatedly rejected. To the extent that Plaintiff's intent is to revive or continue his prior case, he cannot do so.

III. CONCLUSION AND RECOMMENDATIONS

The Court concludes that, under § 1915(g), Plaintiff may not proceed *in forma pauperis* in this action.

Accordingly, IT IS RECOMMENDED that:

1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff be directed to pay the \$402.00 filing fee in full if he wants to proceed with this action.
2. Plaintiff be advised that failure to pay the filing fee in full will result in the dismissal of this case.

These findings and recommendations will be submitted to the United States district judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's

Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: August 16, 2023

/s/ Eric P. Grogan
UNITED STATES MAGISTRATE JUDGE